UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 04C 7403
	)	
Plaintiff,	)	Judge Filip
	)	
v.	)	Magistrate Judge Keys
	)	
WILLIAM J. BENSON,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Comes now Defendant, William J. Benson, who respectfully moves this court for an order dismissing this action because for lack of subject matter jurisdiction to adjudicate issues raised in the Plaintiff's Complaint for Permanent Injunction and Other Relief (hereinafter "Complaint"). Fed. R. Civ. P. 12(b)(1), and 12(h)(3). Defendant Benson further moves for dismissal on the ground that the complaint fails to state a claim for relief. Fed. R. Civ. P. 12(b)(6). In the alternative, should the court decide it does have subject matter jurisdiction and the complaint does state a claim for relief, then on the ground that the complaint fails to join an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(7). In support of his motion, Benson makes the following showing:

FALSE STATEMENTS IN PLAINTIFF'S PLEADINGS

Plaintiff alleges:

> As a condition of probation, Benson was ordered to file timely federal income tax returns and furnish to the probation office financial statements outlining his gross income and any tax-deductible expenses claimed. Maintaining that the Sixteenth

> Amendment is invalid, Benson has refused to comply with Court orders to file his tax returns. Ponzo Decl., ¶9.

Memorandum of Law in Support of the United States' Motion for Preliminary Injunction (hereinafter "Memo"), p. 5.)

The special terms of probation violated the Double Jeopardy Clause of the Fifth Amendment, and the district court so held. On March 18, 1999, United States District Court Judge John F. Grady issued an order vacating the probationary sentence.[1] Defendant exercised his right to remain silent in refusing to provide the illegally ordered information and he did not rely on the Sixteenth Amendment not being ratified. Since the government was attempting to exercise criminal jurisdiction when it had none, Benson's assertion of the Fifth Amendment was wholly justified and proper.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE WHETHER OR NOT DEFENDANT BENSON MADE FALSE OR FRAUDULENT STATEMENTS REGARDING NON-RATIFICATION OF THE SIXTEENTH AMENDMENT.

The United States asserts it may obtain the requested relief by proving,[2] among other things, that Benson "made or caused to be made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan or arrangement" and that "he knew or had reason to know the statements were false or fraudulent." (Memo, p. 11.) To cut to the chase, Benson

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1 "However an illegal sentence can be challenged at any time, and this court has no alternative but to vacate the probationary sentence imposed on Count I on April 29, 1994. It is so ordered. Moreover, the order of October 16, 1998 revoking the defendant's probation on Count I of the indictment is also vacated. The defendant is discharged from supervision on Count I." (Order of Judge Grady, March 18, 1999.)

2 The United States asserts its degree of proof is by the "preponderance of the evidence." Memo at p. 11. Due to the severity of the penalty to be imposed, Defendant Benson asserts the degree of proof must be by "clear and convincing evidence." *Gard v. U.S.*, 1992 WL 113456 (N.D.Ga. 1992)("In fact, at least one United States District Court has determined that the government must prove the elements of § 6701 by the heightened standard of "clear and convincing evidence." *See Warner v. United States*, 700 F.Supp. 532, 533 (S.D. Fla.1988) (because of the severity of the potential penalties in this case,

asserts the federal income tax is a direct tax that requires apportionment, *see Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *aff. reh*., 158 U.S. 601 (1895), and in the absence of the Sixteenth Amendment, the income tax is as unconstitutional today as it was in 1894. *See Eisner v. Macomber*, 252 U.S. 189, 205 (1920). Benson's position is because the Sixteenth Amendment was not ratified, no one needs to file federal income tax returns or pay federal income taxes.[3]

Certainly, Benson's conclusion is absolutely true. If there is no constitutional amendment to relieve the requirement of apportionment, the federal income tax is indeed unconstitutional.[4] Accordingly, the Plaintiff has to prove that the Sixteenth Amendment was properly ratified if it is to establish that what Benson is saying is false and fraudulent.

A review of the case law shows there is unanimous judicial concurrence that the courts of the United States are absolutely precluded from addressing the issue.[5] The Seventh Circuit addressed the issue in *U.S. v. Thomas*, 788 F.2d 1250 (7th Cir. 1986), and since the precise holding of the court is critical, the pertinent part of the case is quoted verbatim:

> Thomas insists, repeating the argument of W. Benson & M. Beckman, The Law That Never Was (1985). Benson and Beckman review the documents concerning the states' ratification of the sixteenth amendment and conclude that only four

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the government shall be required to carry its burden of proof by clear and convincing evidence).").

[3] The underlying principle as announced by the United States Supreme Court is: "The argument, in behalf of the appellants, is that a bill, signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, and delivered by the latter to the secretary of state, as an act passed by congress, does not become a law of the United States if it had not in fact been passed by congress. In view of the express requirements of the Constitution, the correctness of this general principle cannot be doubted." *Field v. Clark*, 143 U.S. 649, 669, 36 L.Ed. 294, 12 S.Ct. 495 (1892).

[4] After seventy years of litigation, this legal proposition should be readily accepted. Yet, should the court require briefing on this issue, Defendant is prepared to supply authority for the proposition.

[5] The Plaintiff disingenuously argues throughout its pleadings that the courts have unanimously held Benson's argument is frivolous. In reality, they have unanimously held Benson's arguments can not be adjudicated in those courts.

states ratified the sixteenth amendment; they insist that the official promulgation of that amendment by Secretary of State Knox in 1913 is therefore void.

Benson and Beckman did not discover anything; they rediscovered something that Secretary Knox considered in 1913. Thirty-eight states ratified the sixteenth amendment, and thirty-seven sent formal instruments of ratification to the Secretary of State. (Minnesota notified the Secretary orally, and additional states ratified later; we consider only those Secretary Knox considered.) Only four instruments repeat the language of the sixteenth amendment exactly as Congress approved it. The others contain errors of diction, capitalization, punctuation, and spelling. The text Congress transmitted to the states was: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Many of the instruments neglected to capitalize "States," and some capitalized other words instead. The instrument from Illinois had "remuneration" in place of "enumeration"; the instrument from Missouri substituted "levy" for "lay"; the instrument from Washington had "income" not "incomes"; others made similar blunders.

Thomas insists that because the states did not approve exactly the same text, the amendment did not go into effect. Secretary Knox considered this argument. The Solicitor of the Department of State drew up a list of the errors in the instruments and--taking into account both the triviality of the deviations and the treatment of earlier amendments that had experienced more substantial problems--advised the Secretary that he was authorized to declare the amendment adopted. The Secretary did so.

Although Thomas urges us to take the view of several state courts that only agreement on the literal text may make a legal document effective, the Supreme Court follows the "enrolled bill rule." If a legislative document is authenticated in regular form by the appropriate officials, the court treats that document as properly adopted. *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892). The principle is equally applicable to constitutional amendments. *See Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922), which treats as conclusive the declaration of the Secretary of State that the nineteenth amendment had been adopted. In *United States v. Foster*, 789 F.2d 457, 462-63 & n. 6 (7th Cir. 1986), we relied on *Leser*, as well as on the inconsequential nature of the objections in the face of the 73-year acceptance of the effectiveness of the sixteenth amendment, to reject a claim similar to Thomas's. *See also Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939) (questions about ratification of amendments may be nonjusticiable). Secretary Knox declared that enough states had ratified the sixteenth amendment. The Secretary's decision is not transparently defective. We need not decide when, if ever, such a decision may be reviewed in order to know that Secretary Knox's decision is now beyond review.

Thomas, 788 F.2d at1253-54.

What clearly emerges from the opinion is the following: 1) the Seventh Circuit addressed no issue other than what Secretary Knox himself addressed; 2) that because the Supreme Court follows the "enrolled bill rule," the doctrine of non-judiciable political questions prohibits a court from addressing the issue, and imposes a duty to accept Knox's proclamation that the Sixteenth Amendment was ratified; and 3) that Secretary Knox's decision is now beyond [court] review.

In *U.S. v. Foster*, 789 F.2d 457 (7th Cir. 1986), the Seventh Circuit admits the issue of the ratification of the Sixteenth Amendment was poorly briefed and failed to provide sufficient information for the court to make a determination:

> Foster only gave this court the briefest of explanations, in his reply brief, as to why the amendment was improperly ratified. In his opening brief he incorporated by reference the brief filed by the defendant-appellant in *United States v. Ferguson*, No. 85-1688, currently pending before this court . . . Mr. Foster has merely cited to a brief in an unrelated case, prepared by a different attorney from his own–which itself does not explain why the Sixteenth Amendment is void beyond stating the conclusion that the required number of state legislatures never ratified the amendment and that then Secretary of State Philander C. Knox falsified the certification record. See Appellant's Brief, *United States v. Ferguson*, No. 85-1688, at 10.

Foster, *supra* at p. 462. The Seventh Circuit noted that Foster made these claims in his reply brief:

> In his reply brief, Foster sets forth the following contentions: (1) that on February 25, 1913 Secretary Knox certified the Sixteenth Amendment as duly ratified, 36 states having tendered ratifying resolutions to the State Department; (2) that Knox knew that 11 states had adopted versions with different wording, 22 states had altered the amendment's punctuation, and one state (Kentucky) had actually rejected the proposed amendment; (3) that the Office of the Solicitor had informed Knox that "a legislature is not authorized to alter in any way the amendment proposed by Congress"; (4) that Knox therefore knew he was under a duty to instruct those 33 states that they must ratify a conforming version of the amendment. Appellant's Reply Brief at 10-12. Based on these contentions, Foster asserts that the ratification of the Sixteenth Amendment did not comply with Article V of the Constitution and that therefore the Sixteenth Amendment is unconstitutional.

Foster, *id*.

The court first noted that since the sixteenth amendment has been in existence for 73 years, that fact is very persuasive on the question of validity.[6] The Seventh Circuit then observed in a footnote that the validity of an amendment's ratification is a non-justiciable political question. Citing to *Leser v. Garnett*, 258 U.S. 130, 137, 42 S.Ct. 217, 66 L.Ed. 505 (1922), the Seventh Circuit wrote "official notice to the Secretary, duly authenticated, that they had done so [ratified the nineteenth amendment] was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts." *Foster*, 789 F.2d at 462-63.

At this point the rulings are clear: not only do the courts lack subject matter jurisdiction to hear the issue of whether a constitutional amendment has in fact been ratified by the required number of states because the issue is non-justiciable, but they are also bound by a conclusive presumption that the amendment in question has in fact been properly ratified.

Notwithstanding its lack of subject matter jurisdiction, in dicta the court stated:

> Thus, we would require, at this late hour, an exceptionally strong showing of unconstitutional ratification. Foster has not made such a showing. He has not asserted any authority, binding on this court or for that matter on Secretary Knox in 1913, for his contention that a state's ratifying resolution may not have different punctuation or slightly different wording than Congress' version of an amendment. [FN7] He offers no support for his claim that any wording changes were not inadvertent but rather the product of "deliberate malfeasance." He has not shown that these slight variations affected the meaning of what the states acceded to in ratifying the amendment. "[He] has merely pointed to technical variances which may be of some historical interest but which have no substantive effect on the meaning of the Sixteenth Amendment." *United States v. House*, 617 F.Supp. 237, 238-39 (W.D.Mich.1985) (addressing precisely the same contentions on a complete record). He clearly has not carried the burden of showing that this 73-year-old amendment was unconstitutionally ratified.

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[6] The proposition can not withstand scrutiny. The only way a proposed amendment becomes a part of the constitution is if it is actually ratified by the requisite number of states.

Foster, 789 F.2d at 463. The dicta does not amount to anything more than a recognition that neither Appellant Foster nor the Seventh Circuit went behind the formal ratification documents any more than in *Thomas*.

In *U.S. v. Ferguson*, 793 F.2d 828 (7th Cir. 1986) and *Miller v. U.S.*, 868 F.2d 236 (7th Cir. 1988), the Seventh Circuit added nothing to *Thomas* or *Foster*; it merely relied on *Thomas* and *Foster*. However, the Seventh Circuit in *Miller* admitted it lacked legal authority to adjudicate the issue:

> We find it hard to understand why the long and unbroken line of cases upholding the constitutionality of the sixteenth amendment generally, *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed.2d 493 (1916), and those specifically rejecting the argument advanced in The Law That Never Was, have not persuaded Miller and his compatriots to seek a more effective forum for airing their attack on the federal income tax structure. *See Foster*, 789 F.2d at 463 n. 6 (the propriety of the ratification of a constitutional amendment may be a non-justiciable political question). Determined and persistent tax protesters like Miller seek to utilize the federal judicial forum without consideration of the significant limitations on the authority of both the district courts and the courts of appeal. One such limitation stems from the bedrock principle of *stare decisis*: lower courts are bound by the precedential authority of cases rendered by higher courts. *U.S. Ex Rel. Shore v. O'Leary*, 833 F.2d 663, 667 (7th Cir.1987). This limitation on judicial power is one of the cornerstones of the legal structure in that it serves broader societal interests such as the orderly and predictable application of legal rules. This doctrine prevents us from disregarding the Supreme Court's opinions upholding the constitutionality of the sixteenth amendment. The Court's decisions are binding on us and the district court absent strong evidence that the Court will overrule its own cases. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir.1987). We perceive no signs that the Supreme Court is harboring any such intentions with regard to the validity of the sixteenth amendment.
>
> Miller would have us disregard this principle and overturn almost three quarters of a century of settled law and declare the sixteenth amendment unconstitutional. He has asked us and the district court to do that which we have no authority to do. He would have us substitute one brand of lawlessness (from his perspective) with a form of lawlessness of our own. Miller and his fellow protesters would be well advised to take their objections to the federal income tax structure to a more appropriate forum.

Miller, 868 F.2d at 241.

As previously discussed, the United States can not prevail as a matter of law unless it can prove Benson "made or caused to be made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan or arrangement" and that "he knew or had reason to know the statements were false or fraudulent." This requires the United States to prove the Sixteenth Amendment was properly ratified, because if it were not properly ratified, Benson's statements would not be false or fraudulent, they would be true, and the United States' action would fail.

Defendant finds it hard to understand why the United Sates has come to this court to adjudicate that question when the Seventh Circuit has clearly held it is an improper forum. There can be no clearer declaration from the reported cases that no court has the lawful authority to adjudicate the issue.

Plaintiff's pleadings have caused a faulty impression regarding Defendant's criminal trials and appeals, and the precise ruling of the court:

> Benson argues that he did not need to file tax returns or pay income taxes because the Sixteenth Amendment was not properly ratified. **(Although this is a typical "tax protester" argument, see, e.g., United States v. Thomas, 788 F.2d 1250, 1253 (7th Cir.1986), Benson's failure to file returns had nothing to do with any general tax protest, and this case is not a tax protester case.)** The district court denied Benson's request for an evidentiary hearing on this issue and refused to hear any Sixteenth Amendment argument. (Emphasis added.)
>
> As the district court noted, we have repeatedly rejected the claim that the Sixteenth Amendment was improperly ratified. *See*, *e.g.*, *United States v. Foster*, 789 F.2d 457, 461-63 (7th Cir.1986); *Thomas*, 788 F.2d at 1253; *United States v. Ferguson*, 793 F.2d 828, 831 (7th Cir.1986); *Lysiak v. C.I.R.*, 816 F.2d 311, 312 (7th Cir.1987) (per curiam). *Accord United States v. Sitka*, 845 F.2d 43 (2d Cir.1988); *United States v. Stahl*, 792 F.2d 1438 (9th Cir.1986). One would think this repeated rejection of Benson's Sixteenth Amendment argument would put the matter to rest. But Benson seizes on language in *Foster* in which, after rejecting the Sixteenth Amendment argument, we stated that "an exceptionally strong showing of unconstitutional ratification" would be necessary to show that the Sixteenth Amendment was not properly ratified. 789 F.2d at 463. Benson is the co-author of The Law That Never Was, a book that purports to "review the

> documents concerning the states' ratification of the Sixteenth Amendment" and to show "that only four states ratified the Sixteenth Amendment [and that] the official promulgation of the amendment by Secretary of State Knox in 1913 is therefore void." *Thomas*, 788 F.2d at 1253. Benson insists that as the co-author of The Law That Never Was, and the man who actually reviewed the state documents "proving" improper ratification, he is uniquely qualified to make the "exceptionally strong showing" we spoke of in *Foster*. Because of this, Benson insists, the district court should have at least granted him an evidentiary hearing on the Sixteenth Amendment issue.
>
> Benson is wrong. In *Thomas*, we specifically examined the arguments made in The Law That Never Was, and concluded that "Benson ... did not discover anything." We concluded that Secretary Knox's declaration that sufficient states had ratified the Sixteenth Amendment was conclusive, and that "Secretary Knox's decision is now beyond review." See 788 F.2d at 1254. It necessarily follows that the district court correctly refused to hold an evidentiary hearing; no hearing is necessary to consider an issue that is "beyond review."

U.S. v. Benson, 941 F.2d 598, 607 (7th Cir. 1991).

The Seventh Circuit's opinion, unfortunately, fails to address certain facts. In *Thomas* the Court did not specifically examine **all** the arguments made in The Law That Never Was; the Court admittedly looked only at what Secretary Knox looked at, the formal notices of ratification received. The Law That Never Was goes much further. For example, when one examines Oklahoma's attempt at ratification, one sees that the legislature **INTENTIONALLY** amended the proposed Sixteenth Amendment. For ease of reading, and because of their singular importance for this motion, the facts stated in the text of the certified journals are presented here.[7] This journal absolutely establishes a core matter to this litigation: Benson has evidence of the non-ratification of the Sixteenth Amendment that was never reviewed by Secretary Knox, his Solicitor of State, or any court.

OKLAHOMA LEGISLATIVE JOURNALS FOR 1910

[7] The specific words showing the intent of the Oklahoma legislature to amend the proposed amendment are bolded and underlined.

1. On February 10, 1910, Oklahoma Governor Haskell sent to the legislature the following message (H.J. 234-235):

STATE OF OKLAHOMA
EXECUTIVE DEPARTMENT.
GUTHRIE.

February 10, 1910.

TO THE HONORABLE LEGISLATURE, STATE OF OKLAHOMA, IN EXTRAORDINARY SESSION:
ELEVENTH MESSAGE.

I submit to you for your consideration, approval or rejection, an amendment to the Constitution of the United States, relating to the income tax. A copy of the communication from the Secretary of State of the United States is herewith attached.

After careful consideration of this subject I find it possible of the accomplishment of much good, as well as capable of undesirable results, and in approving this amendment the people of the States must do so with their eyes open, realizing that it vests the Congress of the United States with power for evil as well as good results, depending upon the will of Congress from time to time.

It is therefore a question upon which you must be the judges of the creation of such additional legislative power in the Congress of the United States.

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Respectfully submitted,
C.N. HASKELL, Governor.

SIXTY-FIRST CONGRESS OF THE UNITED STATES OF AMERICA AT THE FIRST SESSION

Begun and held at the City of Washington on Monday, the fifteenth day of March, one thousand nine hundred and nine.

JOINT RESOLUTION.

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution:

"Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

J.C. CANNON,

Speaker of the House of Representatives.
J.S. SHERMAN,
Vice-President of the United States, and
President of the Senate.

Attest:
A. McDOWELL,
Clerk of the House of Representatives.
CHARLES G. BENNETT,
Secretary.
By HENRY H. GILFRY,
Chief Clerk.

2. On February 21, 1910, the state resolution regarding this amendment (H.J. No. 5), was introduced into the Oklahoma House and read for the first time (H.J. 325):

"House Joint Resolution No. 5, by Messrs. Wortman and Terral, relating to ratifying a proposed amendment to the Constitution of the United States providing for the laying and collecting of taxes on incomes."

3. On February 23, 1910, this resolution was sent to the to the Committee on Criminal Jurisprudence (H.J. 240):

"House Joint Resolution No. 5, by Messrs. Wortman and Terral, to Committee on Criminal Jurisprudence."

4. On February 25, 1910, this resolution was favorably reported out of committee (H.J. 392):

"MR. SPEAKER:

We your Committee on Criminal Jurisprudence, to whom was referred House Joint Resolution No. 5, by Wortman and Terral, entitled: A Resolution ratifying a proposed amendment to the Constitution of the United States providing for the levying and collecting of incomes beg leave to report that we have had the same under consideration and herewith return the same with the recommendation that it do pass.

TERRAL, Chairman."

5. On March 3, 1910, the Committee of the Whole House favorably reported that HJR 5 pass (H.J. 456-457):

"On motion of Mr. Lovelace, the House resolved itself into Committee of the Whole to consider House Bills on the Calendar, with Mr. Johnson presiding.

Mr. Speaker pro tem resumed the chair.
The following report was read and adopted:

MR. SPEAKER:
The Committee of the Whole House, to whom was referred House Bill No. 59, by Mr. Earle; .... House Joint Resolution No. 5, by Messrs. Wortman and Terral; ... report that we have considered same, and recommend .... that House Joint Resolution No. 5 do pass; ....

JOHNSON, Chairman.

On motion by Mr. Tillotson, all bills recommended favorably by the two Committees of the Whole House were ordered engrossed, and placed on third reading and final passage."

6. On March 4, 1910, H.J.R. 5 was reported engrossed (H.J. 462):

"MR. SPEAKER:

We, your Committee on Engrossment, beg leave to report that we have carefully compared House Joint Resolution No. 5 with the original draft and find said engrossment to be correct and in proper form.

Respectfully submitted,

BURNETTE, Vice Chairman."

7. Also on March 4, 1910, this resolution was read the last time and subjected to vote (H.J. 465-466):

"Engrossed copy of House Joint Resolution No. 5 was read third time.
By unanimous consent, the name of Senator Graham was added as one of the authors of the resolution.

The vote recurring on the adoption of House Joint Resolution No. 5 resulted as follows:
Ayes: .... Total – 89.
Nayes: ... Total – 2
Absent: ... Total – 17.

Mr. Speaker declared House Joint Resolution No. 5, having received the constitutional majority, had duly passed, and signed same in open session."

8. On March 4, 1910, the Senate received this resolution (S.J. 397):

“A message was received from the House transmitting House Joint Resolution No. 5, by Messrs. Wortman and Terral of the House and Graham of the Senate, which was read the first time.

HOUSE JOINT RESOLUTION BO. 5 – BY MESSRS. WORTMAN AND TERRAL OF THE HOUSE AND GRAHAM OF THE SENATE.

A Resolution ratifying a proposed amendment to the Constitution of the United States, providing for the levying and collecting of taxes on incomes.”

9. On March 5, 1910, this resolution was read a second time (S.J. 404):

“The following bills were read the second time and referred to the following committees:

House Joint Resolution No. 5, by Messrs. Wortman and Terral of the House and Graham of the Senate, to Committee on Legal Advisory.”

10. On March 9, 1910, the Legal Advisory Committee reported that the resolution, as amended, should be adopted (S.J. 458):

“Senator Thomas reported on behalf of the Committee on Legal Advisory as follows:

MR. PRESIDENT:
We, your Committee on Legal Advisory, to whom was referred House Joint Resolution No. 5, beg leave to report back to the Senate that the same do pass **as herein amended**, that an **amended copy** is hereto attached.

J. ELMER THOMAS, Chairman.
Report received and resolution placed on the calendar under head of general orders.”

11. But Senator Thomas had misgivings (S.J. 463-465):

“Senator Thomas asked unanimous consent to withdraw the report of the Committee on Legal Advisory on House Joint Resolution No. 5.
Request granted.

Senator Thomas reported on behalf of the committee of Legal Advisory as follows:

MR. PRESIDENT:
We, your Legal Advisory committee, to whom was referred House Joint Senate Resolution No. 5 by Wortman of Rogers, Terral of Kiowa, and Graham of the Senate, beg leave to report back to the Senate that said resolution do pass **as amended**.

First: **Amend the title** to read as follows:

A RESOLUTION RATIFYING AN AMENDMENT PROPOSED BY THE SIXTY- FIRST CONGRESS OF THE UNITED STATES OF AMERICA, ON THE FIFTEENTH DAY OF MARCHH [sic], ONE THOUSAND NINE HUNDRED AND NINE, TO THE CONSTITUTION OF THE UNITED STATE [sic] AND DESIGNATED AS ARTICLE SIXTEEN.

Following the enacting clause, **amend the first paragraph** to read as follows:

WHEREAS, The sixty-first congress of the United States of America at its first session begun and held at the city of Washington on Monday the fifteenth day of March, one thousand nine hundred and nine, by joint resolution proposed an amendment to the constitution of the United States, in words and figures as follows: to wit:

Amend the second paragraph to read as follows:
Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled (two-thirds of each house concurring therein), that the following article is proposed as an amendment to the constitution of the United States, which when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution.

Amend the third paragraph by inserting after the word 'derived' the following: 'without apportionment among the several states.'

Amend the last paragraph so as to read as follows: "Now, therefore BE IT RESOLVED by the House of Representatives and the Senate of the State of Oklahoma, in extraordinary session assembled, such subject having been recommended by the Governor for consideration, that said proposed amendment to the constitution of the United States of America is hereby ratified.

J. ELMER THOMAS, Chairman.

On motion of Senator Thomas the report was adopted."

House Joint Resolution No. 5 as amended by the Senate was read as follows:

"House Joint Resolution No. 5 by Messrs. Wortman of Rogers, Terral of Kiowa, and Graham of the Senate.

A RESOLUTION RATIFYING AN AMENDMENT PROPOSED BY THE SIXTY- FIRST CONGRESS OF THE UNITED STATES OF AMERICA, ON THE FIFTEENTH DAY OF MARCH, ONE THOUSAND NINE HUNDRED AND NINE, TO THE CONSTITUTION OF THE UNITED STATES AND DESIGNATED AS ARTICLE SIXTEEN.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES AND THE SENATE OF THE STATE OF OKLAHOMA:

WHEREAS, The sixty-first Congress of the United States of America at its first session begun and held at the city of Washington on Monday the fifteenth day of March, one thousand nine hundred and nine, by joint resolution proposed an amendment to the constitution of the United States, in words and figures as follows, to wit:

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled (two-thirds of each house concurring therein) that the following article is proposed as an amendment to the constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution:

Article 16. The Congress shall have power to lay on collect taxes on incomes, from whatever source derived, without apportionment among the several states, and from any census or enumeration.

Now, therefore, BE IT RESOLVED, by the House of Representatives and the Senate of the State of Oklahoma in extraordinary session assembled, such subject having been recommended by the Governor for consideration, that said proposed amendment to the Constitution of the United States of America is hereby ratified.

The question being shall the resolution pass as amended by the Senate, the roll was called, the vote resulting as follows:
Yeas: .... Total 37.
Nayes: None.
Absent: ... Total – 6.

The resolution having received a majority vote of all the members elected to and constituting the Senate, **the President declared same passed, as amended, by the Senate**.

The engrossed copy of the House Joint Resolution No. 5 as amended by the Senate was signed by President Pro Tempore, Mr. Graham, same was ordered transmitted to the House."

12. On March 10, 1910, the House received notice that the Senate had adopted, with amendments, House Joint Resolution No. 5 (H.J. 541-542):

"SPEAKER OF THE HOUSE OF REPRESENTATIVES:
Sir. I have the honor to inform you and through you the House of Representatives of the passage by the Senate of the following: House Joint Resolution 5, by Messrs. Wortman and Terral, **as amended by the Senate** and which are herewith transmitted to your Honorable body for consideration, with the Senate amendments.

FINLEY, Secretary."

Thereafter, the House voted upon the amended resolution:

"**Senate Amendments** to House Joint Resolution No. 5, by Messrs. Wortman, Terral et al were read.

Mr Terral moved that the House agree to Senate amendments. Roll call had thereon resulted as follows:
Ayes: .... Total– 91.
Nayes: None.
Absent:.... Total – 17.

Mr. Speaker declared that motion carried."

13. The resolution was later signed the same day (H.J. 547):

"Enrolled copies of .... House Joint Resolution No. 5 were signed by the Speaker in open session, after being read at length."

14. After the House considered and adopted the amended resolution, it was transmitted back to the Senate for signing (S.J. 480):

"A message was received from the House transmitting the enrolled copy of House Joint Resolution No. 5, signed by the Speaker.

The enrolled copy of House Joint Resolution No. 5 was read the fourth time at length, the title agreed to and signed by President Pro Tempore, Mr. Graham, same was ordered transmitted to the House."

15. Later that same day, the following message from the Senate was received (H.J. 548):

"SPEAKER OF THE HOUSE OF REPRESENTATIVES:
Sir. I have the honor to inform you and through you the House of Representatives of the signing by the President pro tempore of the Senate of the following: Enrolled House Joint Resolution 5, which is herewith transmitted to your Honorable body.
FINLEY, Secretary.

HOUSE JOINT RESOLUTION NO. 5

A Resolution ratifying an amendment proposed by the Sixty-first Congress of the United States of America, on the Fifteenth day of March, one thousand nine hundred and nine, to the Constitution of the United States and designated as article sixteen.

Be It Resolved by the House of Representatives and the Senate of the State of Oklahoma:

WHEREAS the Sixty-first Congress of the United States of America at its first session begun and held at the City of Washington, on Monday the fifteenth day of March, one thousand nine hundred and nine, by joint resolution proposed an amendment to the Constitution of the United States, in words and figures as follows to-wit:

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled (two-third of each house concurring therein), that the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the Legislatures, of three fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution:

Article 16: The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and from any census or enumeration."

Now Therefore, Be It Resolved by the House of Representatives and Senate of the State of Oklahoma in extraordinary session assembled, such subject having been recommended by the Governor for consideration, that said proposed amendment to the Constitution of the United States of America is hereby ratified.

Approved March 14, 1910."

Even Secretary Knox and his Solicitor recognize that a state can not, intentionally, change a proposed amendment. It was for that reason he chose to treat the various changes as not intentional. From the Solicitor's Memorandum of February 15, 1913:

> The Secretary of State referred to the Solicitor's Office for determination the question whether the notices of ratifications by the several states of the proposed 16th amendment to the Constitution are in proper form, and if they are found to be in proper form, to prepare the announcement to be made by the Secretary of State under Section 205 of the Revised Statutes.

The Solicitor's Memorandum next discusses the certified copies of the resolutions received by the Department of State, and noted the following issues:

1. The Governor of Arkansas vetoed the resolution passed by the legislature of that state.

2. Arkansas has previously rejected ratifying the proposed sixteenth amendment, and thereafter changed its mind.

3. Kentucy's legislature acted on the proposed sixteenth amendment prior to it having been sent to the State by the Secretary of State.

4. The resolutions of thirty-three states contained errors either of punctuation, capitalization, or wording.

5. Minnesota did not transmit to the Department of State a copy of the resolution passed by the legislature of that state.

The Solicitor noted:

> In no case has any legislature signified in any way its deliberate intention to change the wording of the proposed amendment. The errors appear in most cases to have been merely typographical and incident to an attempt to make an accurate quotation.

Thus, the Solicitor fully admits he had no evidence in front of him to indicate that the legislature of any state intended to do that which it has no authority to do, change the amendment to something other than as proposed by Congress. All courts that have considered the issue concur that the legislatures of the various states have no such power. Indeed, the Solicitor himself admits this:

> Furthermore, under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment.

It is clear that the Solicitor decided to rest on a presumption rather than inquire into whether any of the legislatures actually did attempt to alter the amendment proposed by Congress:

> It, therefore, seems a necessary presumption, in the absence of an express stipulation to the contrary, that a legislature did not intend to do something that it had not the power to do, but rather that it intended to do something that it had the power to do, namely, where its action has been affirmative, to ratify the

> amendment proposed by Congress. Moreover, it could not be presumed that by a mere change of wording probably inadvertent, the legislature had intended to reject the amendment as proposed by Congress where all parts of the resolution either than those merely reciting the proposed amendment had set forth an affirmative action by the legislature.

The Solicitor relied on a series of necessarily connected presumptions to reach his conclusion of ratification. Benson's evidence raises two problems. First, the presumption that no state intended to alter the proposed amendment is false. Second, the ultimate conclusion drawn from the false presumption is also false. At least one of the notices of ratification does not contain only mere minor typographical errors incident to an attempt to make an accurate quotation.

The Oklahoma legislature altered by intentional amendment the proposed Sixteenth Amendment. They did not vote to ratify the amendment proposed by Congress; they voted to ratify their own proposed amendment. The formal notice sent to Secretary of State Knox clearly reported the exact language the Oklahoma legislature voted upon. This information was looked at and passed off as nothing more that a typographical error based upon an erroneous presumption.[8]

Defendant Benson has other evidence demonstrating he is not in violation of § 6700; evidence that was not before Secretary Knox, his Solicitor or any court. It will not be presented here. Defendant understands this court can not and will not consider the evidence, and that he may be sanctioned for presenting such evidence. Instead, Benson is asking this court to accept the Seventh Circuit's precedential decisions that the issue in non-justiciable.

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[8] It appears the statutory provisions for allowing a proclamation of constitutional amendment ratification is itself unconstitutional as it allows proposed amendments not actually ratified to be treated as if they were. *See Field*, *supra* at p. 669 ("There is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures, not in the president to approve, nor in the secretary of state to receive and cause to be published, as a legislative act, any bill not passed by congress.").

This court, indeed all courts, lack lawful authority to adjudicate a predicate fact going to the heart of Plaintiff's complaint and motion for an injunction against Benson. In the absence of subject matter jurisdiction the court must dismiss the complaint. Fed. R. Civ. P. 12(h)(3); *Patel v. City of Chicago*, 383 F.3d 569, 571 (7th Cir. 2004).

II. THE COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION FAIL TO STATE A CLAIM FOR RELIEF

In arguing this court lacks subject matter jurisdiction in this case, Benson does not contest that the district courts generally have jurisdiction to enter injunctions under Title 26 in appropriate cases. But, for the reasons stated above, Benson asserts the court must dismiss the complaint much like the *Rooker-Feldman*[9] doctrine requires dismissal of those cases otherwise within a court's statutory jurisdiction. *Frederiksen v. City of Lockport*, 384 F.3d 437, 439 (7th Cir. 2004) ("We now hold that the right disposition, when the Rooker-Feldman doctrine applies, is an order under Fed.R.Civ.P. 12(b)(1) dismissing the suit for lack of subject-matter jurisdiction.").

Should the court disagree, then dismissal for failure to state a claim is required under Fed. R. Civ. P.12(b)(6). *Foster*, *Thomas* and their progeny require this court to accept as a conclusive presumption the ratification of the Sixteenth Amendment. As demonstrated above, the presumption could be wrong. Yet, the United States' position would be sustained solely on the ground that the courts lacks judicial authority to hear the matter, and Benson will be estopped from presenting law and fact to prove the allegations against him are false.

The United States' allegations accuse Benson of knowingly violating the law such that he is subject to penalties under the provisions of 26 U.S.C. § 6700. Paragraph 24 of the Complaint

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[9] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

accuses Benson of engaging "in conduct that substantially interferes with the administration and enforcement of the internal revenue laws." (Complaint, p. 6.) That language is partially derived from 26 U.S.C. § 7212 and makes an attempt to interfere with administration of Internal Revenue laws an element of a criminal offense carrying serious penalties.

A proceeding where Benson is not only conclusively presumed to have knowingly violated the law, but is precluded from presenting law or facts in his defense violates the Due Process Clause of the United States Constitution. And, if the provisions of 26 U.S.C. §§ 6700, 7402 and 7408 are read to authorize such a proceeding, then said interpretation is overbroad. The United States Supreme Court has addressed this precise issue:

> We consider first the validity of a conclusive presumption. This Court has considered such a presumption on at least two prior occasions. In *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), the defendant was charged with willful and knowing theft of Government property. Although his attorney argued that for his client to be found guilty, " 'the taking must have been with felonious intent'," the trial judge ruled that " '[t]hat is presumed by his own act.' " Id., at 249, 72 S.Ct. at 243. After first concluding that intent was in fact an element of the crime charged, and after declaring that "[w]here intent of the accused is an ingredient of the crime charged, its existence is . . . a jury issue," *Morissette* held:
>
> "It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . . [But] [w]e think presumptive intent has no place in this case. **A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.** A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, **this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.**" *Id.*, at 274-275, 72 S.Ct. at 255-256. (Emphasis added; footnote omitted.)
>
> Just last Term, in *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), we reaffirmed the holding of Morissette. In

> that case defendants, who were charged with criminal violations of the Sherman Act, challenged the following jury instruction:
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> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result." 438 U.S., at 430, 98 S.Ct., at 2869.
>
> After again determining that the offense included the element of intent, we held:
>
> "[A] defendant's state of mind or intent is an element of a criminal antitrust offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. *Cf. Morissette v. United States* . . . .

Sandstrom v. Montana, 442 U.S. 510, 521-523 (1979). The Supreme Court finds such proceedings to violate the Due Process Clause:

> *Carrington v. Rash*, 380 U.S. 89 (1965), dealt with a similar situation. There we recognized that Texas had a powerful interest in restricting its electorate to bona fide residents. It was not disputed that most servicemen stationed in Texas had no intention of remaining in the State; most therefore could be deprived of a vote in state affairs. But we refused to tolerate a blanket exclusion depriving all servicemen of the vote, when some servicemen clearly were bona fide residents and when "more precise tests," *id.*, at 95, were available to distinguish members of this latter group. "By forbidding a soldier ever to controvert the presumption of nonresidence," id., at 96, the State, we said, unjustifiably effected a substantial deprivation. It viewed people one-dimensionally (as servicemen) when a finer perception could readily have been achieved by assessing a serviceman's claim to residency on an individualized basis.
>
> But the Constitution recognizes higher values than speed and efficiency. 8 Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier [405 U.S. 645, 657] than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Stanley v. Illinois, 405 U.S. 645, 654-657, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

The state of the case law makes it impossible for this action to proceed without denying Defendant Benson due process of law. Accordingly, it must be dismissed for failing to state a claim for relief.

III. THE COMPLAINT IS DEFICIENT FOR FAILING TO NAME AN INDISPENSABLE PARTY REQUIRED UNDER RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The United States Supreme Court has declared that all questions of ratification of constitutional amendments that go beyond the proclamation of ratification by the Executive Branch of government is to be resolved in the Congress:

> We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Coleman v. Miller, 307 U.S. 433, 450, 59 S.Ct. 972, 83 L.Ed. 1385 (1939).

Notwithstanding more than sixty years of directive to raise ratification issues before Congress, the United States has come to this court. It is absurd to believe this court can join the United States Congress and order it to serve much like a special master to determine the issue of whether the Sixteenth Amendment was in fact ratified. Yet it is only Congress that has subject matter jurisdiction to determine the core issue in this case. If the United States is allowed to proceed in this court, then the complaint is deficient for failing to name an indispensable party.

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WHEREFORE, for all the reasons set forth herein above, Defendant Benson moves this Court for an order dismissing the Plaintiff's complaint.

Dated: February 7, 2005.

The Law Offices of Robert G. Bernhoft, S.C.

by: _____

Jeffrey A. Dickstein
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was sent to the Plaintiff, by sending a copy to its attorney of record, by first class mail, postage paid, to the following address:

Robert D. Metcalfe
Trial Attorney, Tax Division
U.S. Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044

Dated: February 7, 2005

_____
Jeffrey A. Dickstein